

**A Abdul Rahim bin Abdul Manaf v Hicom Holdings
Berhad & Anor**

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-4 OF 99

B WAN AFRAH JC
17 MARCH 2004

Administrative Law — Remedies — Certiorari — Material evidence before Industrial Court showed that applicant was asked to resign by respondent — Industrial Court made finding of fact that applicant not asked to resign — Whether Industrial Court considered material evidence — Whether Industrial Court committed error of law in deciding that applicant not asked by respondent to resign

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Labour Law — Industrial Court — Award — Application to quash — Material evidence before Industrial Court showed that applicant was asked to resign by respondent — Industrial Court made finding of fact that applicant not asked to resign — Whether Industrial Court considered material evidence — Whether Industrial Court committed error of law in deciding that applicant not asked by respondent to resign — Whether award should be quashed

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The applicant's service was terminated by the respondent on the grounds of misconduct for insubordination when the applicant refused to obey an order issued by the respondent to go on transfer following the respondent's restructuring exercise. The applicant contended that the reason for his refusal to go on transfer was because it was actuated by mala fide on the respondent's part who had earlier asked him to resign. The issue before the Industrial Court was whether the applicant was asked to resign by the respondent. The Industrial Court made a finding of fact that the applicant was not asked to resign.

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This was the applicant's application for an order of certiorari to quash the decision of the Industrial Court on the grounds that the Chairman of the Industrial Court had erred in law and had acted beyond his jurisdiction. The applicant contended that there was material evidence before the Industrial Court to show that the applicant was asked to resign by the respondent, namely, a letter written by the applicant and addressed to the respondent titled 'Resignation letter as requested' ('the said letter'). The applicant further alleged that when he refused to resign, the respondent deliberately withheld his bonus and sidelined his assignments and duties.

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H **Held**, allowing the application with costs:

(1) The title of the said letter and the first paragraph therein implied that the applicant had been coaxed into resigning. Although the rest of the said letter did not explicitly refer to the subject matter, nonetheless, the title of the said letter was sufficient to suggest that the applicant was asked to resign. In any case, if it were true that the respondent did not ask the applicant to resign, the respondent should have responded to the said letter. The respondent's inaction in not rebutting the said letter immediately suggested that the respondent did request the

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- applicant to resign. Since the Industrial Court had failed to scrutinise the said letter, the court was duty bound to review such a finding (see paras 7, 10 and 13). **A**
- (2) The statement by the Chairman of the Industrial Court that the issue of the applicant being asked to resign was first raised in the Industrial Court was puzzling in the light of the documentary and oral evidence presented before him. The failure by the Chairman to properly consider the said letter before concluding that the issue of the applicant being asked to resign was first raised in the Industrial Court amounted to an error of law (see paras 18 and 19); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 AMR 1628 followed. **B**
- (3) The Chairman of the Industrial Court merely acknowledged the respondent's reason for the delay in the payment of bonus as an administrative problem but did not make a finding on it. There seemed to be an act of mala fide by the respondent towards the applicant because it was only upon the applicant's threat that the respondent paid the bonus to the applicant. The failure by the Chairman of the Industrial Court to make a finding as to whether the delay in making the bonus payment amounted to suppression on respondent's part constituted an error of law (see paras 21 and 22). **C**
- (4) At the Industrial Court, the applicant did not challenge the bona fide of the respondent's restructuring exercise. Therefore, the Industrial Court was entitled to assume that the restructuring exercise was bona fide. The court was satisfied with the respondent's explanation that upon the restructuring exercise, the applicant's job responsibility was taken over by another officer in the department as an additional portfolio. This was a legitimate act by the respondent. Nonetheless, even if the Chairman of the Industrial Court did not make a finding on whether the transfer ordered by the respondent was bona fide or otherwise, this was not so fatal as to amount to an error of law warranting this court's interference (see paras 28–30). **D**
- (5) Therefore, on the issue of whether the applicant was first asked to resign, the answer was in the affirmative. As such, his dismissal was without just cause and excuse and the Industrial Court's award was quashed, with costs (see paras 33 and 34). **E**
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[Bahasa Malaysia summary

Khidmat pemohon telah ditamatkan oleh responden atas alasan salah laku kerana keingkaran apabila pemohon enggan mematuhi arahan yang diberikan oleh responden untuk berpindah berikutan dengan latihan penstrukturan semula organisasi. Pemohon memberitahu keenganan beliau untuk berpindah adalah kerana pemindahan itu adalah berdasarkan sifat mala fide responden yang sebelum itu telah meminta pemohon meletak jawatan. Isu di hadapan Mahkamah Perusahaan adalah sama ada pemohon diminta meletakkan jawatan oleh responden. Mahkamah Perusahaan memutuskan bahawa pemohon tidak diminta meletakkan jawatan. **H**

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- A** Ini adalah permohonan pemohon untuk perintah certiorari untuk membatalkan keputusan Mahkamah Perusahaan atas alasan bahawa Pengerusi Mahkamah Perusahaan telah melakukan kesilapan perundangan dan telah bertindak di luar bidang kuasanya. Pemohon telah menegaskan bahawa terdapat bukti yang material di hadapan Mahkamah Perusahaan yang menunjukkan bahawa pemohon telah diminta oleh responden untuk meletakkan jawatan, iaitu surat yang ditulis oleh pemohon dan dialamatkan kepada responden yang bertajuk 'Resignation letter as requested' ('surat tersebut'). Pemohon seterusnya mendakwa apabila beliau enggan meletak jawatan, responden secara sengaja menggantung bonus pemohon dan mengetepikan segala tugasannya
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- C** **Diputuskan**, membenarkan permohonan dengan kos:
- (1) Tajuk dan perenggan pertama surat tersebut jelas mengandaikan bahawa pemohon telah diminta meletakkan jawatan. Walaupun perenggan lain dalam surat tersebut tidak jelas merujuk kepada perkara tersebut, tetapi tajuk surat tersebut adalah mencukupi untuk menunjukkan bahawa pemohon diminta meletakkan jawatan. Di dalam sesuatu kes, sekiranya benar responden tidak meminta pemohon meletakkan jawatan, responden sepatutnya bertindak balas terhadap surat tersebut. Tiada tindakan daripada responden untuk menentang surat itu menunjukkan bahawa responden memang meminta pemohon meletakkan jawatan. Oleh kerana Mahkamah Perusahaan juga gagal meneliti surat tersebut mahkamah mempunyai tanggungjawab untuk meneliti keputusan tersebut. (lihat perenggan 7, 10 dan 13).
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- E**
- (2) Kenyataan Pengerusi Mahkamah Perusahaan mengenai isu pemohon diminta meletakkan jawatan telah dikemukakan buat pertama kalinya dalam Mahkamah Perusahaan adalah pelik walaupun terdapat banyak keterangan lisan dan dokumentar yang dikemukakan. Kegagalan Pengerusi untuk mempertimbangkan dengan sewajarnya surat tersebut sebelum memutuskan bahawa isu pemohon diminta meletak jawatan dikemukakan buat pertama kali di Mahkamah Perusahaan jelas menunjukkan kesilapan perundangan (lihat perenggan 18 dan 19); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 diikuti.
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- (3) Pengerusi Mahkamah Perusahaan hanya mengiktirafkan alasan responden lambat membayar bonus kerana masalah pentadbiran tetapi tidak membuat sebarang penelitian ke atasnya. Jelas terdapat tindakan mala fide dari responden kepada pemohon oleh kerana hanya selepas pemohon membuat ugutan bonus telah dibayar kepada pemohon. Kegagalan Pengerusi membuat penyiasatan sama ada kelewatan pembayaran bonus itu adalah satu penindasan di pihak responden merupakan satu kesalahan perundangan (lihat perenggan 21 dan 22).
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- (4) Di Mahkamah Perusahaan, pemohon tidak mencabar bona fide pihak responden untuk penstrukturan semula organisasinya. Oleh itu, Mahkamah Perusahaan berhak membuat andaian bahawa penstrukturan semula organisasi itu adalah bona fide. Mahkamah berpuas hati dengan keterangan responden bahawa selepas penyusunan semula organisasi tersebut tanggungjawab kerja pemohon kini telah diambil alih oleh pegawai lain di dalam jabatan sebagai portfolio tambahan. Walaubagaimanapun, walaupun
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sekiranya Pengerusi Mahkamah Perusahaan tidak mengambil kira sama ada pemindahan tempat kerja tersebut adalah bonafide, ini tidaklah serius dan bukan kesalahan perundangan yang mewajarkan campur tangan mahkamah ini. (lihat perenggan 28–30).

- (5) Oleh yang demikian, berkenaan isu sama ada pemohon diminta meletakkan jawatan, jawapannya adalah benar. Oleh itu, pemohon telah dibuang kerja tanpa sebab yang wajar dan award yang diberi oleh Mahkamah Perusahaan telah dibatalkan, dengan kos (lihat perenggan 33 dan 34).]

Notes

For cases on Industrial Court's awards, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 394–417.

Cases referred to

Airspace Management Services Sdn Bhd v Col (R) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (folld)

Legislation referred to

Rules of the High Court 1980 O 53 r 1(2)

Suria Kumar Df Paul (Mohd Idris & Associates) for the applicant

Edward Saw Keat Leong (Ng Yook Woon, Andrew TC Saw & Co) for the respondent

Wan Afrah JC:

[1] This is an application by one Encik Abdul Rahim bin Abdul Manaf ('the applicant') for an order of certiorari to quash the decision of the Industrial Court in Award No 107 of 1999. In the said Award, the Industrial Court held that the applicant was dismissed with just cause and excuse by the company Hicom Holdings Berhad ('the respondent').

[2] Briefly, the facts of the case are that the applicant's service was terminated on grounds of misconduct for insubordination when he refused to obey an order issued by the respondent to go on transfer. The applicant contended that the reason for his refusal to go on transfer was actuated by mala fide on the respondent's part who earlier had asked him to resign.

[3] The issue before the Industrial Court was whether the applicant was asked to resign by the respondent's Vice President of Administration and Human Resources. Upon hearing the case, the Industrial Court made a finding of fact that the applicant *was not asked* to resign. In the Award, the learned Chairman of Industrial Court concluded as follows:

- A** Mahkamah selepas mendengar penghujahan memberi keputusan lisan bahawa pekerja tidak berjaya membuktikan bahawa pertukarannya adalah tidak jujur oleh sebab syarikat telah memintanya meletakkan jawatannya sebelum itu. Mahkamah mendapati di atas pertimbangan kemungkinan SSI tidak ada meminta pekerja meletakkan jawatannya sebelum dia ditukarkan.
- B** [4] Thereafter, the applicant challenged the said Award wherein he stated the Chairman of the Industrial Court had erred in law and had acted beyond his jurisdiction. The applicant, in his statement under O 53 r 1(2), presented nine grounds to quash the Industrial Court's decision. However, when both counsel appeared before me, the applicant's counsel sought this Court's indulgence to re-examine the Award and make a decision pertaining to four issues only.
- C** (i) *There was material evidence before the Industrial Court to show that the applicant was asked to resign by the respondent by the company's Vice President*
- D** [5] The issue whether the applicant was asked to resign remains the crux of the case and necessitates that the Court study both documentary and oral evidence critically. To disturb the findings of fact and decision of the earlier Court, one would have to be more critical and analytical.
- E** [6] Counsel for the applicant drew me to the material evidence, which is the letter (memorandum dated 15 April 1996) written by the applicant and addressed to the respondent. The letter was titled: 'Resignation letter as Requested' (exhibit YM-1). The applicant's counsel argued that the Chairman of the Industrial Court did not put any weight on the evidence that the applicant was asked to resign.
- F** [7] To my mind, the title of the said letter and the first paragraph that follows does imply that the applicant had been coaxed into resigning. The conversation held earlier between both parties must have given cognisance to the applicant to cause him to have titled the said letter as such, and express his reaction to the demands made by the respondent. I took note that the rest of the content of the said letter did not explicitly refer to the subject matter, wherein the applicant was just patting himself on the back as to the importance of his position and his past successes. Nonetheless, it appears to me that the title of the said letter was sufficient to suggest that the applicant was asked to resign.
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- H** [8] Interjecting in my mind was the question whether the applicant in writing the said letter wrongly connoted what the respondent had informed him about the restructuring and consolidation exercise that the company was undergoing. The respondent's counsel pointed out that the applicant had, in the Court proceedings, stated that 'Benar bahawa *tanggapan saya* ialah SSI suruh saya letak jawatan'. The Malay word '*tanggapan*' in literal translation to English is 'assume'. Could it have been the wrong assumption or impression on the applicant's part to think that he was asked to resign? Or was it the case of the wrong word used without much care and thought?
- I** [9] Nonetheless, I am inclined to consider the material evidence in question, ie the said letter, in determining whether the applicant was asked to resign.

[10] A point to ponder, if it was true that the respondent did not ask the applicant to resign, is why didn't the respondent reply to the latter's letter. In my view, the inaction, on the respondent's part to not rebut the applicant's said letter *immediately*, does suggest that he agreed to having made the request that the applicant resign.

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[11] Counsel for the respondent submitted that it was the applicant's burden to prove that he was asked to resign when the respondent had vehemently denied the same. Respondent's counsel pointed out that based on the evidence before it, the Industrial Court had to make a decision as to whether to believe the applicant or SSI (the respondent) and it made a finding of fact that on the balance of probabilities, SSI did not ask the applicant to resign and had given its reasons for doing so. At page 13 of the Award, the learned Chairman of the Industrial Court found:

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Dalam menimbangkan isu ini Mahkamah bertanyakan yang mana lebih mungkin di antara pendirian kedua belah pihak yang bertentangan itu. Adakah lebih mungkin SSI tidak meminta pekerja meletakkan jawatan atau sebaliknya. Di atas pertimbangan kemungkinan dan mengambil kira keterangan yang telah disebutkan di atas adalah lebih mungkin SSI tidak pernah meminta pekerja meletakkan jawatannya. Pada pendapat Mahkamah pekerja salah anggap bahawa arahan bertukar itu adalah tawaran yang boleh ditolakny. Setelah mendengar keterangannya dan meneliti surat-suratnya mahkamah berpendapat pekerja juga adalah seorang yang susah untuk bermuafakat dan mengikut perintah dan mempunyai pendapat sendiri bahawa dia adalah seorang yang sangat pandai. Sebagai perbandingan mahkamah mendapati SSI adalah saksi yang jujur dan boleh dipercayai terutamanya tentang sebab pekerja ditukarkan. Mahkamah payah untuk bersetuju dengan peguam bijaksana pekerja bahawa SSI menggunakan pertukaran pekerja sebab helah untuk memberhentikannya. Mahkamah tidak nampak apa sebab SSI hendak menganiaya pekerja.

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[12] Therefore, according to the respondent's counsel, the Industrial Court cannot be accused of having committed an error of law or that it had acted in excess of jurisdiction when it was the applicant's fault for not adducing cogent and corroborated evidence to prove this purported 'request for resignation' that he deemed so important to his case.

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[13] I do agree with learned counsel for the respondent that it is trite law that findings of fact made based on the credibility of witnesses are not open to review in judicial review proceedings as stated in *Airspace Management Services Sdn Bhd v Col (R) Harbans Singh a/l Chingar Singh* [2000] 3 AMR 3009. However, when the Industrial Court in its findings of fact, failed to scrutinise the letter (memorandum) YM-1, the court is thus duty bound to review such a finding.

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[14] To further prove the applicant's case, the applicant's counsel stated that apart from the first letter, there was other documentary proof indicating that it was true that the applicant was asked to resign. Reference was made to the applicant's subsequent letters (memorandums dated 30 May 1996 and 27 June 1996) in response to the transfer letter issued by the respondent. The applicant declined to accept the transfer relating to the 'proceeding' events (to be read as 'preceding').

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- A** [15] Equally in another letter (memorandum dated 6 July 1996), and in response to the show-cause letter issued by the respondent, the applicant clearly expressed in paragraph three of his letter as follows (p 108):

I am of the opinion that your present actions are nothing more than a ruse to unlawfully terminate my services *after failing to persuade me to resign voluntarily*.

- B** [16] In the domestic inquiry that followed, the applicant raised the point that he was asked to resign. Reference was made to p 123 and in the summary of findings at p 171 paragraph 2.7(c). The applicant also maintained that he was asked to resign in the Industrial Court.

- C** [17] In citing the evidence above, counsel for the applicant was disturbed when the Chairman of the Industrial Court stated in the Award that he agreed with the respondent's counsel that the issue of whether the applicant was asked to resign was first raised in the Industrial Court's proceedings and that the Court did not believe the applicant (claimant). To this end, the applicant's counsel submitted that the Industrial Court had acted unreasonably and was erroneous in coming to such a perverse decision.

- D** [18] I am equally puzzled by such a statement from the Chairman of the Industrial Court who failed to take note of the documentary and oral evidence presented before him, to the effect that it was the first time the issue was raised. Also, I cannot agree with the respondent's counsel's explanation in his written submissions justifying the Chairman of the Industrial Court's statement that it was of the opinion that it was an after-thought because YM-1 (the letter) did not specifically allege that the applicant was asked to resign and that it was written after he was asked to go on transfer.

- E** [19] Based on the above, the failure by the Chairman of the Industrial Court to properly consider YM-1 in arriving at the conclusion that the issue that the applicant was asked to resign was raised for the first time during the proceeding would amount to an error of law that goes to jurisdiction as stated in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 AMR 1628. In this particular case, it was held that:

- G** It was neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or mis-applies or mis-sates a principle of the general law.

- H** (ii) *Failure by the Industrial Court to make a finding in regard to the issue of the delay in making the bonus payment*

- I** [20] In relation to and in support of the applicant being asked to tender his resignation, counsel for applicant pointed out to me the relevant part of the statement of case wherein the issue of the respondent's wilful delay in releasing bonus payment was raised. The applicant alleged that when he

refused to resign, the respondent deliberately withheld his bonus and sidelined his assignments and duties. The applicant's counsel argued that the Industrial Court did not make a finding of fact that his client had been victimised and harassed by the respondent to force him into agreeing to resign.

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[21] Perusing the Award, I noted that the Chairman of the Industrial Court merely acknowledged the respondent's reason for delay in the bonus payment as an administrative problem. True enough, the Industrial Court did not make a finding and was silent on this particular issue in relation to what was alleged by the applicant as against the respondent.

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[22] At this juncture, there seems to be an act of mala fide by the respondent towards the applicant. However, it would have satisfied me further had counsel for the applicant asked the important question of whether the delay in making the bonus payment was limited solely to the applicant or whether it affected all the respondent's employees across the board.

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[23] In my view, although the bonus was paid prior to the transfer order which supports that fact there was no intended act of victimisation against the applicant, *but* the respondent's sincerity is put into question. The applicant, during evidence in chief complained that; 'Gaji saya dibayar semula. Bonus saya disekat. Selepas saya ugut melalui peguam, saya dibayar bonus melalui cek. Selalunya bayaran dibuat terus ke akaun bank. Ini bukan suatu kebiasaan.' Clearly, only upon the applicant's threat did the respondent pay the bonus to the applicant. The non-conventional manner of the bonus payment gave me bad vibes as against the respondent.

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[24] Here, I noted that counsel for the applicant failed to challenge and cross-examine the respondent's witness as to the underlying reasons why the payment of bonus was delayed. My observation is that he just dribbled the ball but did not score the goal. Thus, it is left for me to draw my own conclusion from the evidence and arguments that were put before me. To my mind, the failure by the Chairman of the Industrial Court to make a finding as to whether the delay in making the bonus payment amounted to suppression on respondent's part constitutes an error of law. In this case, the Industrial Court allowed an error of law to intrude into his deliberation of the facts and he did so by not making a proper finding on the facts before him.

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(iii) Failure by the Industrial Court to come to the conclusion the transfer ordered by the company was not bona fide because there was evidence to show that the claimant's job function was taken over by other existing officers

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[25] The applicant also contended that the transfer order was not bona fide because his job function was handled by another junior officer in the company as stated in his statement of case.

[26] However, it was narrated by the respondent's counsel that there was a take-over of ownership in the company. Thereafter, the company was desirous of revamping its organisational structure to be more effective, manageable and profitable. A new organisation chart was drawn and job

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- A** functions in various departments were streamlined. According to the respondent, some employees were relocated to various subsidiary companies within the group, whilst others chose to resign of their own accord.
- B** [27] In applicant's case, he was directed to be transferred to a subsidiary company within the group to fill up a position not less favourable than his current status. To meet the changes ensuing from restructuring exercise the application's job function was reassigned to another officer who was placed with additional job responsibilities.
- C** [28] The applicant, at the Industrial Court stage, did not at all challenge the bona fides of this restructuring exercise and neither did he lead any evidence during his examination in chief or cross-examination to show that the restructuring exercise was conducted in a mala fide intent by the respondent. Therefore, the Industrial Court was entitled to assume that the restructuring exercise was bona fide.
- D** [29] I am satisfied with the respondent's explanation that upon the restructuring exercise, the applicant's job responsibility was taken over by another officer in the department as an additional portfolio added to that officer's job function. This was a legitimate act by the respondent.
- E** [30] Nonetheless, even if the Chairman of the Industrial Court did not make a finding on this, this issue to my mind, is not fatal so as to amount to an error of law warranting the interference of this Court.
- (iv) The remedy awarded by the Chairman in Court with regard to the demeanor of the claimant was tantamount to a personal attack*
- F** [31] The demeanor of a person plays an important role in any court's decision. It helps the court in determining the matter, whether favourably or unfavourably, in the circumstances of each individual case. However, the court must not lose sight of the issues at hand, the evidence as well as the facts of the case.
- G** [32] Looking into the applicant's letters (memorandums) I agree with the Chairman of the Industrial Court's statement as to the applicant's personality and conduct which was that the applicant was a self opinioned and difficult character. Nonetheless, I am not swayed by demeanour alone but remain objective with regard the evidence available and the facts of the case.
- H** [33] In conclusion, I return to the crux of the case, ie whether the applicant was first asked to resign. I verily believe he was asked to do so. Hence, I reiterate my reliance on *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 AMR 1601 and on the principle enunciated in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433 that the Industrial Court cannot consider or admit evidence that is irrelevant to the issues or reject evidence relevant to the issues. As such, his dismissal was without just cause and excuse.
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[34] I hereby quash the Industrial Court Award with costs. As to the quantum, I take note that although a figure of salary was pleaded, no evidence was led in the Industrial Court. As such, I hereby order that this case be remitted to the Industrial Court for assessment.

Application allowed with costs.

Reported by Lim Lee Na

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